IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 955 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant

Versus

MEHBUB ABDULGANI KATHKI (VENDOR) & 1 - Respondents

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Appearance :
Mr. K.C. Shah, Ld. APP for Appellant.

MR MA KHARADI for Respondents: 1 - 2.
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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 29/09/2005

ORAL JUDGMENT

1.The appellant-State of Gujarat has preferred this appeal under Section 378 of the Code of Criminal

Procedure challenging the judgment and order dated 30th May, 1996 passed by the learned Chief Judicial Magistrate, Godhra in Criminal Case No. 367 of 1994 acquitting the accused for the offences punishable under Sections 2(1)(A)(B) (J)(14), 7(1)(3)(5) and 16(1) of the Prevention of Food Adulteration Act, 1954 (herein after referred to as 'the Act'.) This Court (Coram: A.N. Divecha, J) has granted leave and admitted the appeal vide order dated 7/11/1996.

2. The case of the appellant in short is that the original complainant Food Inspector on 24/6/1992 at about 11.00 a.m., visited the shop of the accused. After introducing himself as such, he declared the intention of collecting Sweet Betel Nut pieces known in vernacular as “Meethi Supari” for analysis. In presence of panch witness Abdul Razak Chota the complainant purchased 3 packets of 250 grams each meethi supari from the accused. The intimation / notice under Rule 12 in Form-VI was issued and office copy thereof bears the signature of the vendor. The same is produced at exhibit-14. The complainant made payment of Rs.22=50 as price for purchasing the sample food article. The receipt is at exhibit-17. The 3 packets

were wrapped in a brown paper and sealed properly as required under th law. The seal contained the duly signed slip issued by the office. The entire proceedings of collecting sample was done in presence of panch witness and the panchnama was drawn. The panchnama contains signature of panch which was at mark-A. The Food Inspector thereafter took the food sample to the office and prepared memorandum in Form-VII, one sample of food sample article was sent to the Public Analyst, Baroda and the specimen copy of seal and memorandum was also separately sent to the Public Analyst. The remaining 2 sample food articles were sent to Local Health Authority at Nadiad. The receipt of the sample by the Local Health Authority was acknowledged, the said acknowledgment card is produced at exhibit-19. The receipt of the sample by Local Health Authority was acknowledged and the acknowledgment card is produced at exhibit-20. As the sample food article was not found in conformity with the standards laid down under the Prevention of Food Adulteration Rules, 1955 (herein after referred to as the “Rules”), the necessary papers with the report of the Public Analyst was submitted to the Local Health Authority for obtaining appropriate consent. The forwarding letter and the consent have

been produced at exhibit-26 and 27 respectively. The complaint came to be lodged thereafter. The notice under section 13(2) is said to have been issued to the accused by registered post A.D. The postal acknowledgment dues have been produced at exhibit-28 and 29. The trial court after recording plea of the accused proceeded further in the matter and framed two issues, namely; (1) whether he prosecution proves beyond doubt that the accused have committed offence under section 2(1)(A)(B)(J)(14); and under section 7(1)(3)(5); and 16 (1) of the Act.?; (2) what order ?

The first issue is answered in the negative, and the second issue as per his order.

3. After discussing the evidence at length the trial court has come to the conclusion that the prosecution has failed in proving the case beyond doubt and therefore, acquitted the accused vide its order dated 30/5/1996. The said order is impugned in the present appeal.

4. Learned APP Shri. K.C. Shah has submitted that the factum of adulteration is proved beyond doubt in the form of report of Public Analyst. The prosecution has

proved that there was no lacuna in the process of collecting and sealing the sample food article. The said food article was examined by the Public Analyst and it can not be said that there was any procedural lapse in sending the sample food article to the Public Analyst. In view of this the order and judgment of the trial court impugned in this appeal deserves to be quashed and set aside. As the sample food article is stated to be adulterated in the report of the Public Analyst, the accused deserves to be convicted and visited with appropriate punishments. Shri. Shah has submitted that the order of the trial court is bereft of any reasoning and on this count also the impugned order deserves to be reversed and the accused is to be convicted.

5. Shri. Kharadi appearing on behalf of the accused respondents has in turn submitted that this being an acquittal appeal this court may not disturb the order of acquittal unless & until it is manifestly established by the appellant that the impugned order has been based upon perverse finding so as to result into miscarriage of justice. The incident of collecting sample was that of year 1992 and after passing of

substantial time, this court may not interfere in the order of acquittal. Shri. Kharadi has submitted that the respondents accused have right to make out a case even at the appellate stage for supporting the acquittal on the reasoning and contentions that may be different than the one adopted by the trial court. Shri. Kharadi has submitted that the entire appeal can be disposed of only on the ground that the prosecution has failed in proving beyond doubt by leading positive evidence that the report of the Public Analyst was in fact served upon the accused as required under section 13(2) of the Act. Shri. Kharadi has submitted that the records & proceedings are before this court and perusal thereof wold show that the prosecution have not brought on record even the copy of the notice under section 13(2) of the Act, where under it is said to have been informed the accused that, he has a right to approach the court within ten days for having the second sample tested by the Central Food Laboratory. This lacuna on the part of the prosecution in not bringing on record even the office copy of the notice in itself, coupled with the fact that the prosecution has in no way led any evidence either in the testimony of original complainant Food Inspector or by producing the copy of

the notice under section 13 (2) of the Act showing that the report of the Public Analyst was sent to the accused.

6. Shri. Kharadi has submitted that testimony of original Food Inspector merely contains the statement that the Local Health Authority, Godhra sent notice to the accused under section 13(2) of the Act and the postal acknowledgment dues have been produced at exhibit-28 and 29. Here in this testimony the factum of sending the report has not been stated. This amounts to an omission which in itself is sufficient to vitiate the version of the prosecution. Shri. Kharadi has submitted that the mandatory requirement of section 13(2) is not fulfilled if the accused was only sent notice without copy of the Public Analyst report. It was the bounden duty of the prosecution to prove by leading positive evidence that the requirement of section 13(2) is complied with. Omission in the statement of the complainant or any evidence indicating that along with notice, copy of the report of the Public Analyst was also sent to the accused, would render the version of the prosecution vitiated and therefore, the acquittal recorded by the trial court deserves to be sustained

only on this count. Shri. Kharadi has relied upon the observation of this Court in case of VALLABHBHAI POPATBHAI Vs. STATE OF GUJARAT & ANR., reported in 2005(2)G.L.R. pg. 1518 in support of his submission that the prosecution has to prove beyond doubt service of copy of the Public Analyst report also as an essential requirement of compliance with section 13(2) of the Act.

7. Shri. Shah has submitted that the defence has never raised this dispute of non receipt of copy of the Public Analyst report. Shri. Shah has invited attention of this Court to the written submission made on behalf of the accused which does not contain such a specific contention and, therefore, Shri. Shah submits that, at this appellate stage it would not be open to the accused respondents to raise such a contention which essentially amounts to agitating a point on facts. Therefore Shri. Shah has submitted that, in case any point is capable of raising any doubt, then, the appropriate course would be to remand the matter for taking further evidence on this aspect.

8.Shri. Kharadi in response to Shri.Shah's submission has

relied upon a decision of the Apex Court in case of RAMESHWAR DAYAL Vs. STATE OF U.P. Reported in 1996 SCC (Cri) pg. 75 in support of his submission that non supply of report of Public Analyst would cause serious prejudice to him and the conviction can not be sustained on such facts. Such a plea can be raised even at a later stage if material on record supports the same.

9. This court has perused the material on record and heard the counsels of the respective parties at length. This Court is though not in complete agreement with the reasoning and findings of the trial court in the order impugned, is of the view that, the order of acquittal deserves to be viewed in light of the materials on record and submissions made by Shri. Kharadi.

10. The entire appeal could be disposed of only on this count. The record shows that even office copy of the notice under section 13 (2) is said to have been served upon the accused is not produced by the prosecution. Had the copy of such notice was brought on record, it would have been an indicative of the fact whether it did accompany with the report of Public Analyst as

envisaged under the Act. In absence of said office copy of notice and in absence of any such positive evidence that the Public Analyst report was in fact served upon the accused in compliance with mandatory provisions of section 13(2) of the Act, it would not be proper for this court to presume that the report must have been supplied only on the strength of production of two postal acknowledgment dues at exhibit 28 and 29. The exhibit 28 and 29 merely indicate receipt of notice but that in itself can not be said to be proving sending of the copy of Public Analyst report also with the notice. The testimony of the Food Inspector is also conspicuously silent about sending of report of the Public Analyst along with notice as envisaged under section 13 (2) to the accused. The mere statement that Godhra Local Health Authority sent notice to the accused under section 13(2) in itself would not be sufficient to prove the service of report of the Public Analyst to the accused as it is required under section 13(2) of the Act.

11. This Court is mindful that this being an acquittal appeal even if there are two views are possible, the view which tilts in favour of the accused deserves to

be taken for sustaining the order of acquittal. In view of this,this Court, though may not be in complete agreement with the reasoning of the trial court, is of the view that, the order of acquittal dated 30/5/1996 passed in criminal Case No. 367 of 1994 calls for no interference. The appeal, therefore, deserves to be dismissed and is dismissed accordingly.

[S.R. BRAHMBHATT, J]

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